No. 3953

In the United States Circuit Court of Appeals

For the Ninth Circuit

FORBES P. HASKELL, Jr., as Receiver of SCANDINAVIAN-AMERICAN BUILDING COMPANY, a Corporation et al.,

Appellant,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et. al.,

Appellees.

Answering Brief of McClintic-Marshall Company

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STATEMENT OF THE CASE.

The appeal of Forbes P. Haskell, Jr., as Receiver, concerns the McClintic-Marshall Company in two respects, first, insofar as it relates to the arbitration clause in the McClintic-Marshall Company's contract, and second, insofar as it relates to the

effect of the appointment of the Receiver upon the then pending lien foreclosure proceeding. Neither proposition involves any question of fact. The first turns entirely upon the pleadings, the second upon the pleadings and the procedure of the District Court.

By written contract (Exhibit A to Bill of Complaint, Transcript vol. 1, p. 11, received in evidence as Exhibit F, Tr. vol. 2, p. 730), dated February 5, 1920, McClintic-Marshall Company agreed with the Scandinavian-American Building Company to furnish and deliver the structural steel work for the Scandinavian-American Bank Building in Tacoma, Washington, in accordance with plans and specifications prepared by Frederick Webber. By the terms of the contract shipment was to begin within sixty days and to be completed within one hundred and twenty days from the date of said contract. In turn the Building Company agreed to furnish complete and final data for the work to be done by the McClintic-Marshall Company within five days after the date of the agreement, and to pay for such steel 5.9c per ton f. o. b. the contractor's works, but with the then rate of freight allowed to Tacoma, Washington, "In funds current at par in Pittsburgh or New York City, as follows: 85 per cent of the full value of each shipment on the 20th day of the month following date of shipment, remaining 15 per cent thirty days thereafter." (Tr. p. 13.)

The contract contained the following further provisions:

> "ARTICLE VI. Failure by the purchaser to make payments at the times stated in this agreement shall give the contractor the right to suspend work until payment is made, or at his option, after thirty (30) days' notice in writing, should the Purchaser continue in default, to terminate this contract and recover the price of all work done and material provided and all damages sustained; and such failure to make payments at the time stated shall be a bar to any claim by the Purchaser against the Contractor for delay in completion of the work." (Tr. p. 13.)
>
> "ARTICLE X. It is also further agreed between the parties hereto that any dispute whatsoever growing out of this Agreement shall be referred to three Arbitrators, one to be appointed by each of the parties to this Agreement, and the third by the two thus chosen. Each Arbitrator shall be qualified by experience in Engineering and Contracting to perform the duties assigned to him. The decision of any two of these shall be final and binding, and each of the parties to this agreement shall pay one-half of the expense of such reference." (Tr. p. 15.)

Shipment was not completed within the time specified, nor were payments made for the steel

shipped as agreed upon. Accordingly after delivery of all of the steel called for by this contract McClintic-Marshall Company filed its claim of lien in accordance with the statutes of the State of Washington, Remington's 1915 Code, Sections 1129 to 1148, Remington's 1922 Compiled Statutes, Sec. tions 1129 to 1148, and instituted this action in the court below upon said contract, and to foreclose such lien.

The defendants Scandinavian-American Building Company, Scandinavian-American Bank of Tacoma, Washington, the State Bank Commissioner, and Forbes P. Haskell, Jr., as Deputy State Bank Commissioner, appeared and moved to dismiss the bill of complaint upon the ground (among others) that "a meritorious dispute growing out of said contract" had arisen, that the complainant had refused to arbitrate as provided for in Article X of the contract (supra) and, "that by reason of said failure the said complainant is without authority in law or equity to maintain, and is estopped from maintaining, this suit." (Tr. vol. 1, pp. 18 to 20.) This motion was in due course denied. (Tr. vol. 1, p. 21.)

Thereafter upon application of the complainant and of the parties doing business as co-partners under the name and style of Tacoma Mill Work Supply Company, by which name they will be designated hereafter, who had intervened and by their answer and cross complaint (Tr. vol. 1, p. 166), as

well as by separate petition (Tr. vol. 1, p. 47) sought the appointment of a Receiver for the defendant, Scandinavian-American Building Company, "to properly care for the assets of said Building Company, and in particular protect the said building," Forbes P. Haskell, Jr., was appointed as such receiver on March 23, 1921. Following such appointment, upon motion of the Scandinavian-American Building Company, the lower court on May 21, 1921, made this order:

> "It is Therefore Ordered, That F. P. Haskell, Jr., be, and he hereby is appointed receiver of the defendant company, and that said receiver be, and he is hereby authorized and directed to take possession of all of the property and assets of the defendant of every kind and description; that said receiver be, and hereby is, authorized and directed to employ such necessary caretakers and assistant as he may deem necessary to protect the property of defendant during receivership; that said receiver file in this action his oath as such receiver in due form of law, and *the* he file a bond as such receiver as required by law for the faithful performance of the duties involved, the amount of which bond shall be in the sum of $10,000, and shall be approved by this Court." (Tr. vol. 1, pp. 52-3.)

Thereafter on June 19, 1921, the court made a further order *nunc pro tunc*, as of May 21, 1921,

which after reciting the fact of the appointment of the Receiver, and that he was directed to defend all actions or proceedings brought by the various holders of liens and encumbrances, and

> "Whereas, it was intended by the said order that the holders of liens and encumbrances on and against the property of the said Scandinavian-American Building Company, involved in the above entitled action, should have leave and authority of this Court to sue the receiver of the said Scandinavian-American Building Company, for the purpose of foreclosing and enforcing their liens against the property of the said Building Company, and the said order was entered partly for that purpose," (Tr. p. 55.)

provided as follows:

> "Now, Therefore, it is ordered that all persons, and particularly the Far West Clay Company, having claims, demands, liens or encumbrances against the property of the Scandinavian-American Building Company, are hereby authorized and empowered to make Forbes P. Haskell, the receiver thereof, a party to the foreclosure for said liens or encumbrances, in the above entitled action, and to sue the said receiver for the said purpose, and to serve on him the necessary papers, processes, or pleadings,

to accomplish said purpose." (Tr. vol. 1, p. 55.)

In the meantime, permission being duly had (see Tr. p. 22) the complainant filed its Amended and Supplemental Bill of Complaint (Tr. vol. 1, p. 23) in which were joined as parties defendant a great number of parties who had, since the filing of the original Bill of Complaint, filed claims of lien against the property involved, and thereafter another order was entered on June 27, 1921, making such receiver a party defendant, and permitting the necessary amendment of the Amended and Supplemental Bill of Complaint. (Tr. vol. 1, p. 57.)

To this Amended Bill the Scandinavian-American Building Company and Forbes P. Haskell, Jr., as its Receiver, made answer, asserting that because of the failure of the complainant to make delivery within the time specified in its contract the Building Company had suffered great loss, that the dispute over such loss was by the express provisions of Article X of the contract to be arbitrated, that demand for such arbitration had been made, and refused, and that therefore the complainant was not entitled to recover anything until the contract had been fully complied with, i. e., by first submitting this alleged dispute to arbitration. (Tr. vol. 1, p. 59.) They further denied that complainant had any right to claim or file any lien, such denial being likewise predicated, though not ex-

pressly so alleged, upon the claimed refusal of arbitration (Tr. p. 60.)

This answer further asserted three items of counter claim: first, an item of $14,052.76, additional freight occasioned by the increase in freight rates, taking effect before the delayed shipments of steel were made (Tr. pp. 62, 63); second, an item of $3,000, alleged to be a loss or damage sustained due to faulty fabrication of the steel (Tr. p. 63); and, third, an item of $50,000, alleged to be the loss in rentals and interest on capital investment resulting from the delay in shipment (Tr. pp. 63, 64), and reiterated the fact of demand for arbitration of these several matters and the complainant's refusal to submit them to arbitration.

The complainant moved to strike the portions of this answer relating to arbitration and the three several items of counter claims. (Tr. vol. 1, p. 141.) This motion was granted save as to the first and second counter claims. (Tr. vol. 1, pp. 66 to 68.)

By way of reply the complainant alleged that the delay in shipment was occasioned by the failure of the Building Company to furnish complete data within five days of the date of the contract, and by other causes beyond its control, all specifically recognized and by the terms of the contract constituting excuses for delay in shipment. (Tr. vol. 1, pp. 69 and 72.)

After hearing evidence the District Court dis-

posed of this claim of breach of the contract by delay in shipment as follows:

> "The court has heretofore upheld the jurisdiction of the court and found the arbitration provision inapplicable, and that defendant under the terms of the contract has no right to offset because of loss of rent and interest alleged to have been caused by delays in delivery.
>
> "Under the evidence I conclude that the delays were occasioned by defendant's failure to furnish details and drawings promptly and that no offset is allowed because of increase in freight charges." (Tr. vol. 2, p. 459.)

This finding was made effective by paragraph XL of the Decree. (See Tr. vol. 2, p. 336.) The appellant assigns no error on this finding, or upon that portion of the Decree giving effect thereto.

As to the alleged dispute over the faulty fabrication, the lower court found:

> "The court finds no evidence of damage to defendant because of defects in fabrication in excess of that conceded by complainant: to-wit, $2,000." (Tr. p. 459.)

Appellant assigns no error upon that finding.

The so-called "meritorious dispute" must therefore be now admitted to be *wholly without merit.*

It is perhaps significant that appellant brings no evidence either in the shape of testimony re-

ceived—or proof offered—that any demand for arbitration was made, and none that there ever was any question raised by the Building Company over the defective fabrication.

POINTS AND AUTHORITIES

I. As to the Question of Arbitration.

(1) The jurisdiction of the courts cannot be ousted by the private agreements of individuals made in advance; all such contracts are illegal and void as being contrary to public policy.

Home Ins. Co. vs. Morse, 20 Wall. 445, 22 Law. Ed. 365.

Doyle vs. Cont. Ins. Co., 94 U. S. 535, 24 Law. Ed. 148.

Guaranty Trust Co. vs. Green Cove R. Co., 139 U. S. 137; 35 Law. Ed. 116.

Mitchell vs. Dougherty, 90 Fed. 639.

Kuhnhold vs. Compagnie General Trans Atlantique, 251 Fed. 387.

See generally:

47 *L.R.A.N.S. p.* 352 and cases there cited.

(2) A general agreement in or collateral to a contract to submit to arbitration any and all controversies that shall arise between the parties and empowering arbitrators finally and conclusively to decide the entire dispute, and every question of law or fact in the proceeding is voidable at will.

"Parties will not be permitted by agreement to submit to arbitration, to oust the jurisdiction of the courts, whether the agreement relates to existing differences or to those which may arise in the future. In other words, the courts may disregard such agreements, assume jurisdiction, and determine matters in dispute which constitute the subject matter of the agreement on the principle that the parties cannot deprive themselves of the right to resort to the proper legal tribunals for the submission of their controversies."

"An agreement to submit to arbitration not consummated by award is no bar to a suit at law or in equity concerning the subject matter submitted, and the rule applies both in respect of agreements to submit existing differences and agreements to submit differences which may arise in the future."

5 *C. J. Arbitration and Award*, pp. 20 and 42.

"It is settled that a provision or agreement in an executory contract that any dispute which may arise thereunder shall be submitted to arbitration, will not, in the language of the authorities, 'oust the courts of their jurisdiction,' or in other words, bar a suit, either at law or in equity. Such an agreement is said to be contrary to public policy."

2 *R. C. L. Arbitration and Award*, Sec. 11, p. 360.

"The question is presented whether an action will lie in view of a clause contained in the proposal for the submission of differences to a board of arbitration. The clause is as follows:

'In case any difference of opinion shall arise between the parties to this contract in relation to the contract, the work to be or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract, and these two shall have the power to name an uninterested umpire whose decision shall be binding on all parties to the contract.'

This stipulation falls within the general rule laid down in *Holmes vs. Richet*, 56 Cal. 307, 38 Am. Rep. 54, and not the exception. The general rule is, using the language of that case, that:

'An agreement to refer a case to arbitration will not be regarded by the courts, and they will take jurisdiction and determine a dispute between parties, notwithstanding such agreement.' "

American Pac. Construction Co. vs. Modern Steel Co., 211 Fed. 849, at 855 (C. C. A. 9th Cir.)

"It is the rule that a naked executory agreement (not under authority of statute or rule of court) made after the arising of a dispute to submit the same to arbitration, is revocable

at will by either party in advance of the actual carrying out of the agreement by arbitration, and the award thereon. It is also the rule, even in case of agreement to arbitrate made before the arising of the dispute and in connection with the contract out of which it is anticipated a dispute may arise (as in contracts of insurance), that when the agreement for arbitration is merely collateral to and independent of the other provisions of the contract, such arbitration is not a condition precedent to the right to sue for a breach of such provisions, and that in such cases the remedy for refusal to arbitrate is by action for breach of that agreement."

Memphis Trust Co. vs. Brown, Ketchum Iron Works, 166 Fed. 398, at 402 (C. C. A. 6th Cir.)

"A provision, in a contract for the payment of money upon a contingency, that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action upon it shall be maintained until after such an award, then, as was adjudged in *Hamilton vs. Liverpool & L. & G. Ins. Co.*, above cited, and in many cases therein referred to, the award is a condition precedent to the right of action. But where no

such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount to arbitration is collateral and independent; and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract. *Roper vs. Lendon*, 1 El. & El. 825; *Collins vs. Locke*, L. R. 4 App. Cas. 674; *Dawson vs. Fitzgerald*, L. R. 1 Exch. Div. 257; *Reed vs. Washington F. & M. Ins. Co.*, 138 Mass. 572; *Seward vs. Rochester*, 109 N. Y. 164; *Birmingham F. Ins. Co., vs. Pulver*, 126 Ill. 329, 338; *Crossley vs. Connecticut F. Ins. Co.*, 27 Fed. Rep. 30."

Hamilton vs. Home Ins. Co., 137 U. S. 370; 34 Law. Ed. 708 at p. 713.

Knoche vs. Chicago, Milwaukee & St. P. Ry. Co., 34 Fed. 471.

Mitchell vs. Dougherty, 90 Fed. 639.

Munson vs. Straits of Dover, 99 Fed. 787.

U. S. Asphalt R. Co. vs. Trinidad Lake P. Co., 222 Fed. 1006.

The Eros, 241 Fed. 186.

Aktieselskabet Korn, etc., vs. Rederiaktiebolaget Atlanten, 232 Fed. 403, 250 Fed. 935.

Meacham vs. Jamestown R. R. Co., 211 N. Y. 346, 105 N. E. 653.

See also:

47 *L. R. A. N. S.*, at p. 354, and cases there cited.

(3) Irrespective of the merits of the rule or the validity of the reasons originally assigned for it, it has become the settled law of the courts of the United States.

U. S. Asphalt R. Co. vs. Trinidad Lake P. Co., 222 Fed. 1006.

Atlantic Fruit Co. vs. Red Cross Line, 276 Fed. 319.

Aktieselskabet Korn-og, etc., vs. Rederiaktiebolaget Atlanten, 64 L. Ed. 586; 252 U. S. 314.

(4) Article X of the contract does not impose a condition precedent, but is collateral only, and hence does not bar a suit on the contract or for its breach.

Hamilton vs. Home Insurance Co., 137 U. S. 370, 34 Law. Ed. 708.

Munson vs. Straits of Dover, 90 Fed. 787, 102 Fed. 926.

"This clause cannot be regarded as condition precedent to the maintenance of a subsequent suit in the courts because it provides that the arbitrators shall 'settle'—that is, dispose of—the dispute. The case therefore does not fall within the decisions which hold that agreements such as to ascertain the amount or the extent of the claim by arbitration as a

condition precedent to a suit in the courts, are valid because the question of liability is left to be determined by the court."

Aktieselskabet Korn, etc., vs. Rederiaktiebolaget Atlanten, 232 Fed. 403; 250 Fed. 935, at 937. (C. C. A. 2nd Cir.)

(5) Federal courts decide questions of general law, such as is the question of the effect to be given a provision for arbitration, for themselves, and are not bound by decisions of state courts.

"If a question depends upon principles of general jurisprudence or rests upon general or commercial law, the Federal Courts will decide for themselves and are not bound by state decisions. * * * Among questions of general law as to which the Federal Courts exercise their independent judgment, regardless of state decisions * * * may be mentioned questions relating to * * * validity of an arbitration agreement to oust the court's jurisdiction."

25 *C. J., Federal Courts*, 846 to 849.

"On any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the courts of the state, but will exercise their own judgment, even when their jurisdiction attaches

only by reason of the citizenship of the parties in an action at law of which the courts of the state have concurrent jurisdiction, and upon a contract made and to be performed within the state. *New York Cent. R. Co., vs. Lockwood*, 84 U. S. 17 Wall. 357, 368 (21:627, 636); *Myrick vs. Mich. Cent. R. Co.*, 107 U. S. 102 (27:325); *Carpenter vs. Providence Washington Ins. Co.*, 41 U. S. 16 Pet. 495, 511 (10:1044); *Swift vs. Tyson*, 41 U. S. 16 Pet. 1 (10:865); *Brooklyn City & N. R. Co. vs. Nat. Bank of the Republic*, 102 U. S. 14 (26:61); *Burgess vs. Seligman*, 107 U. S. 20, 33 (27:359, 365); *Smith vs. Alabama*, 124 U. S. 465, 478 (31:508, 512); *Bucher vs. Cheshire R. Co.*, 125 U. S. 555, 583, (31:795, 798). The decisions of the state courts certainly cannot be allowed any greater weight in the federal courts when exercising the admiralty and maritime jurisdiction exclusively vested in them by the Constitution of the United States."

Liverpool & Great Western Steam Co. vs. Phoenix Ins. Co., 129 U. S. 397; 32 Law. Ed. 788, at 793.

"The question as to what is a matter of local and what of general law, and the extent to which in the latter this court should follow the decisions of the state courts, has often been presented. The unvarying rule is that in mat-

ters of the latter class this court, while leaning towards an agreement with the views of the state courts, always exercises an independent judgment."

Baltimore & O. R. Co. vs. Baugh 149 U. S. 369; 37 L. Ed. 772, at 774.

"This court construes all contracts brought before it for consideration, and in doing so its action is independent of that of the state courts which may have exercised their judgment upon the same subject. *Swift vs. Tyson*, 16 Pet. 19."

U. S. vs. Muscatine, 75 U. S. 675; 19 Law. Ed. 490, at p. 494.

"We have not felt called upon to discuss in detail the several Pennsylvania cases which have been urged upon our attention by the learned counsel for the defendant in error. The question before us is not as to the enforcement of the contract in accordance with the law of the place where it was made, but is as to whether a court of the United States should because of the parties' agreement in advance to abstain from invoking its jurisdiction, refuse to enforce the contract at all. Upon this question the decisions of the Supreme Court of the United States are controlling, and they admit of but one conclusion."

Mitchell vs. Dougherty, 90 Fed. 639, at 645. (C. C. A. 3rd Cir.)

"The question presented by these motions is to be regarded as one of general law; i. e., one wherein the courts of the United States are not bound to follow or conform to the decisions of the state jurisdiction in which they may happen to sit. This was intimated by Dallas, J., in *Mitchell vs. Dougherty*, 90 Fed. 639, 33 C. C. A. 205, and explicitly held in *Jefferson Fire Ins. Co. vs. Bierce* (C. C.), 183 Fed. 588."

U. S. Asphalt R. Co. vs. Trinidad Lake P. Co., 222 Fed. 1006, at 1011.
Ins. Co. vs. Bierce, 183 Fed. 588.
Aktieselskabet Korn, etc., vs. Rediaktiebolaget Atlanten, 232 Fed. 403; affirmed 250 Fed. 935. (C. C. A. 2nd Cir.)
The Eros, 241 Fed. 186.
Atlantic Fruit Co. vs. Red Cross Line, 276 Fed. 319.

(6) The general law governing any contract having been determined, the courts of the United States will give effect to such remedies as are afforded by the particular laws of the state wherein such contract is sought to be enforced.

National P. Co. vs. Bredel Co., 193 Fed. 887.

II. As to the Effect of the Appointment of Receiver.

(1) Receiver's possession is subject to all valid and existing liens upon the property at the time

of his appointment, which does not divest a lien previously acquired in good faith.

High, Receivers, 4th Ed., sections 138 and 440.

23 *R. C. L., Receivers*, secs. 51 and 118.

(2) Such lien may be enforced even after appointment with leave of the court appointing the Receiver.

High, Receivers, 4th Ed., sec. 139.

Chesapeake Coal Co. vs. Black, 224 Fed. 924.

Commonwealth R. Co. vs. Trust Co., 135 Fed. 984.

Schmidtman vs. Atlantic Phosphate Corp., 230 Fed. 769.

Randall vs. Wagner Glass Co., 94 N. E. 739.

Foster Federal Practice (6th Ed.), vol. II, p. 1614.

(3) Leave to prosecute the foreclosure proceedings and to sue the receiver was expressly given.

(See Order May 21, 1921, Tr. vol. 1, p. 53; Order June 14, 1921, Tr. vol. 1, p. 54; Order June 27, 1921, Tr. vol. 1, p. 57.)

ARGUMENT.

The Arbitration Question.

Appellant in dealing with this question assigns five reasons why the arbitration clause in appellee's contract should have been given effect. He as-

serts, first, that the action instituted by complainant is local, and that therefore the Washington law controls, and, second, that the arbitration clause in the particular application sought to be made of it will merely settle an incidental question arising in the course of the execution of the contract, leaving the parties to resort to the courts to enforce the result of that arbitration by proceedings to foreclose their claim of lien.

(See Receiver's opening brief, pp. 26 and 27.)

The arbitration clause in question by its terms applies to all disputes whatsoever, whether of fact or of law. It is general and all embracing. The appellant seeks to place his own limitation thereon, by the application of this clause to the determination of a particular dispute or disputes. The effect of such clauses is not to be determined by the results which would happen if applied to a particular situation, but by consideration of the disputes or questions to which by their terms they may apply. (Cf. application of the rule against perpetuities.) If the provision for arbitration by its terms is not a condition precedent to the maintenance of suit, is not by its terms limited to the determination of particular facts, for example, a provision that an engineer or architect shall determine the quantity or quality of work done, but on the contrary, if, as here, it extends to all possible questions or disputes "growing out of" the agreement in which it is embodied, then it is invalid.

See authorities cited, supra, pp. 12-17 inc.

In making their first point counsel for appellant blind themselves to the very distinction marked in making their second. The arbitration clause provides for settlement of any and all liability on the contract. The remedy for such liability e. g., the foreclosure of a lien, can only be had through the courts. Arbitration is in no manner concerned with it. The arbitrators could not, even assuming the arbitration clause binding, decide whether or not a lien existed, since that right does not depend upon the contract but upon compliance with the conditions of the statute, which are extraneous to the contract. Nor could the arbitrators enforce the lien should they determine that the complainant was entitled to one. That remedy must be sought through the courts and in the enforcement of that remedy the local law for the first time comes into play.

With respect to the claim of McClintic-Marshall Company, appellee here, there are two questions to be determined: (a) The amount due, which is a question of substantive rights; (b) the manner of collection, which is here a question of special remedial rights given by local statute. On the former question the federal courts exercise their independent judgment. On the latter they are bound by the local law in determining the applicability and extent of the remedy sought.

This distinction was recognized and given effect

to by the district court's ruling upon the motion to strike the defense based upon the arbitration clause. His decision on this point is in the following language:

> "If it be conceded that a different rule obtains in the two jurisdictions (i. e., the Washington state courts and the federal courts), yet the construction of the contract in which the arbitration clause appears is a matter of general law in which the federal courts are not bound by the common law of the state. The court concludes that the lien for materials furnished under the contract is an incident of the contract rather than the contract being an incident of the lien, and that it, therefore, follows that the question of the state's rule as to the effect of arbitration provisions in contracts is inapplicable to this controversy. For this reason paragraphs 1, 2 and 3 of the motion to strike will be granted."

Here as in every case of arbitration and award the award depends for its enforcement upon the courts. The particular manner of enforcement depends upon the availability of one or more particular remedies created by local statutes. It follows obviously that we have neither quarrel nor concern with the cases cited by the appellant under his first point. (See Receiver's opening brief, pp. 28 to 39.) Correctly applied they do not militate against our position in the slightest, and so far as

they have been examined in detail they might well be added to the authorities submitted by us.

It is equally obvious that the fourth point made by the Receiver and discussed in his brief on pages 48 to 51 is neither well taken nor seriously contended for. That the rule we contend for, namely, that a general agreement to submit to arbitration any and all controversies and empowering the arbitrators finally and conclusively to decide the entire dispute, is voidable at will, is the settled law of the courts of the United States, is conclusively established by the very decision cited by the Receiver, namely, *Aktieselskabet Korn, etc., vs. Rederiaktiebolaget Atlanten*, 64 Law. Ed. 586, 252 U. S. 314. As counsel very kindly point out, in that case the Supreme Court of the United States was asked to reconsider the rule established with respect to arbitration agreements and reverse the position theretofore taken. In declining to do so Mr. Justice Holmes said:

> "With regard to the arbitration clause, we shall not consider the general question whether a greater effect should not be given to such clauses than formerly was done, since it is not necessary to do so in order to decide the case before us."

Therefore we shall not burden the court with any discussion of the authorities cited by us upon this point, deeming it sufficiently clear from the action taken by the Supreme Court in the case cited that

the rule is recognized and established. In connection with the argument made upon this point counsel assert (Receiver's opening brief, p. 51) that it was directly decided in the case of *New York Lumber Co. vs. Schneider*, 1 N. Y. Sup. 441, and affirmed in 24 N. E. 4 (erroneously cited as 27 N. E. 4) that a clause whereby a contractor agrees to arbitrate all matters of dispute arising under the contract is a waiver of the right to file a lien. An examination of that case will show that the action was brought to foreclose a mechanics' lien to which there was interposed a plea of arbitration and award, which was held good and the complaint was dismissed. The plaintiff appealed, insisting upon his right to maintain his action upon *his original cause of action* to the disregard of the award. The court of appeals in sustaining the action of the lower court said:

> "If the award which is relied upon by the defendants in defense of this action is unaffected and not avoided by anything appearing in the record before us, it was a complete bar to the maintenance of any action upon the original right or cause. For the original cause of action, as the result of arbitration there was substituted this award, which is a new right with corresponding obligations. The original right and cause of action arising out of the contract disappeared; or rather merged in this award."

But the plaintiff contended that the award did not pass upon all matters in dispute, and therefore was not binding, and that the whole question could therefore be reopened, as to which the court of appeals said:

> "I think the rule should be a settled one that the submission by parties of all matters in dispute growing out of a particular transaction or contract will estop them from thereafter claiming that the award is not conclusive, if its language and terms when fairly regarded are comprehensive."

That this case has no bearing upon the question thus becomes apparent. The report of this case in 1 N.Y. Supplement was cited to the court below, but when Judge Cushman's attention was called to the decision of the Court of Appeals he turned to counsel for the Receiver and said: "If counsel have any more overruled cases to cite let them produce them now."

Under the second reason given by the Receiver why the arbitration clause should be upheld it is argued that the clause is a condition precedent. (See Receiver's opening brief, pp. 39 to 45.) We know of no better and more conclusive answer to such a contention than the statement of the Supreme Court in *Hamilton vs. Home Insurance Co.*, 137 U. S. 370, 34 Law. Ed. 708, at p. 713, as follows:

> "A provision, in a contract for the payment

> of money upon a contingency, that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action upon it shall be maintained until after such an award, then, as was adjudged in *Hamilton vs Liverpool & L. & G. Ins. Co.*, above cited, and in many cases therein referred to, the award is a condition precedent to the right of action."

But if specific and even more pointed authority is desired it is not wanting. Speaking to this point with regard to a similar provision the Circuit Court of Appeals for the Second Circuit in *Aktieselskabet Korn, etc., vs. Rederiaktiebolaget Atlanten*, 232 Fed. 403, 250 Fed. 935, at 937, said:

> "This clause cannot be regarded as condition precedent to the maintenance of a subsequent suit in the courts because it provides that the arbitrators shall 'settle'—that is, dispose of — the dispute. The case therefore does not fall within the decisions which hold that agreements such as to ascertain the amount or the extent of the claim by arbitration as a condition precedent to a suit in the courts, are valid because the question of liability is left to be determined by the court."

Counsel, however, insist that the case of *Memphis Trust Co. vs. Brown Ketchum Fire Works*,

166 Fed 398, is on all fours with the case at bar. With such position we cannot agree. In that case the contract provided that the architect should determine in case of dispute "what should be deducted on account of defective work, or what should be deducted or added on account of changes in the drawings or specifications, or the value of extra work, or the amount of additional time to be allowed to the contractor for the completion of the work, or in any other case or contingency whatsoever in which a dispute should arise in regard to the conditions or proper interpretation of the agreement," and that "his decision shall in all such cases be final and binding on the parties." A dispute having arisen between the parties over certain extras claimed by the contractors and over certain deductions claimed by the owners, an agreement was made for the substitution of one Graham in place of the architect named as the arbitrator, the agreement of substitution expressly providing "that the submission to such arbitration should be a condition precedent to any suit brought by either party against the other." The contractors refused to go on with the arbitration, which however proceeded to an award, which the contractors repudiated and brought their action asking that it be set aside, and that they might have a decree for the amount of their original claims. The lower court held that the agreement to arbitrate had been revoked, and entered judgment for the amount claimed by the contractors. The Circuit Court of Ap-

peals for the Sixth Circuit reversed this decision, holding that this particular agreement to arbitrate did not come within the rule as to general and all embracing arbitration agreements, but that it fell within that class of agreements providing that disputes over specific questions such as the quantity, quality, price, workmanship, value of the work, amount of the loss and damage, should be submitted to arbitration, and the determination of the amount, kind or quality thus made shall be a condition precedent to any action upon the contract, and that hence the agreement to arbitrate was binding and not subject to revocation. The Circuit Court of Appeals, however, expressly recognized and stated the rule which we contend for (see Ante pp. 14-15).

The Receiver now seeks to have the arbitration clause here involved classified among those limited provisions for arbitration which are upheld, and contends that the particular dispute over which it is claimed arbitration was here demanded is one which could be properly and validly submitted to arbitration as a condition precedent. It may very well be that had the provision for arbitration in appellee's contract been so limited it would have been upheld as a binding condition precedent, but as before stated its effect cannot be governed by the particular application sought to be made of it when by its terms it is not so limited. It needs no argument to demonstrate that .the arbitration clause here in question cannot be brought within the nar-

row compass contended for by the appellant. A reading of the provision itself is a sufficient demonstration. (See Ante p. 5.) Rather than falling within the narrow or limited class of case this clause falls within the general rule recognized and given effect to by this court in *American Pacific Construction Co. vs. Modern Steel Co.*, 211 Fed. 849, at p. 855, as follows:

> "The question is presented whether an action will lie in view of a clause contained in the proposal for submission of differences to a board of arbitration. The clause is as follows:
>
> 'In case any difference of opinion shall arise between the parties to this contract in relation to the contract, the work to be or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract, and these two shall have the power to name an uninterested umpire whose decision shall be binding on all parties to the contract.'
>
> This stipulation falls within the general rule laid down in *Holmes vs. Richet*, 56 Cal. 307, 38 Am. Rep. 54, and not the exception. The general rule is, using the language of that case, that:
>
> 'An agreement to refer a case to arbitration will not be regarded by the courts, and they will take jurisdiction and determine a dispute between parties, notwithstanding such agreement.' "

In connection with this point certain statements are made by the Receiver on page 45 of his opening brief, which cannot be permitted to pass unchallenged. It is said:

> "It (McClintic-Marshall Company) did not ship the steel in accordance with the terms of the contract."

Yet the lower court found to the contrary, and specifically that the delay in shipment was due to the Building Company's own fault. The Receiver does not question that finding with any proper or appropriate assignment of error, nor does he bring to this court any of the testimony on which that finding rests. It is with poor grace that he makes such an unwarranted statement. The statement is then made that the McClintic-Marshall Company admitted that a part of the steel was improperly fabricated. To be fair it should be added that with that admission went a consent that the amount of its claim should be reduced by the damage caused by such faulty fabrication, and the claim was so reduced. It is impossible for us to understand how the Building Company was thereby damaged, since it is not contended here that the damage due to such faulty fabrication was greater than that conceded and allowed. It is next asserted that the McClintic-Marshall Company admitted "that after it was in default, but before it shipped the steel, it refused to arbitrate." With all due deference, this statement like the first above quoted is false.

The complainant never admitted that it was in default in the shipment of steel, and its contention as above pointed out was sustained by the lower court and is not now questioned. By the same token we deny that it ever refused to arbitrate. This court will search the record before it in vain to find any evidence of any demand for arbitration, much less any admission of refusal to arbitrate. The letters quoted at length in the Receiver's opening brief (pp. 10 to 20 inclusive) contain no reference whatsoever to the question of arbitration. For the most part they do not even proceed from the Building Company, but from the president of the Scandinavian-American Bank, an entirely separate institution, according to the contention of counsel for the Receiver of the Building Company and for the Bank Commissioner and his deputy. The only place where it is asserted that arbitration was demanded and refused is in the answer of the Building Company, and its Receiver, and again in the answer of the Bank and the Supervisor, and those allegations were by order of the lower court stricken.

Counsel at the same place in their brief complain that the Building Company in the events which happened must perforce submit to the filing and foreclosure of a lien, with the great expense consequent thereto, and it is of course true that due to the failure of the Bank and the consequent failure of the building project the foreclosure of the lien was inevitable, but that incident does not affect

the proposition that had the Building Company been solvent and able to pay the just claims against it, it could have come into court in answer to the complainant's bill and tendered the amount which it admitted to be due, in which event, had its contentions been sustained, there would have been no foreclosure of the lien and no consequent expense. The lower court found against him on every contention of fact which the Receiver made, and the latter apparently is content to abide by such findings. As the record stands, therefore, it was the Building Company which was in default, which had breached its contract, and what rule of public policy, so blindly invoked by counsel, is there which will say that the defaulting party should not bear the consequences of his breach?

As a third point on this question the Receiver argues that a breach of the arbitration clause was a bar to the prosecution of this case in an equitable proceeding. (See Receiver's opening brief, pp. 45 to 48.) The equitable maxim that "He who comes into equity must come with clean hands," is invoked in support of this point. If we understand the argument aright, it is briefly that the Washington law or the equity enforced by the Washington courts will bar an action until the arbitration has been carried out or refused by the party to whom it is tendered, and that this rule of law of the Washington court therefore closes the door of the federal courts to a party otherwise entitled to

admittance therein. The claim is wholly without merit.

> "It may not be doubted that judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action, and which therefore the several states may not by any exertion of authority in any form directly or indirectly destroy, abridge, limit or render inefficacious. The doctrine is so elementary as to require no citation of authority to sustain it."
>
> *Harrison vs. St. Louis R. Co.*, 232 U. S. 318; 58 L. Ed. 621, at p. 624.

> "Being a suit of a civil nature in equity no state practice or statute or adjudication could deprive a citizen of another state of his right to have it tried by the courts of the United States." (Citing numerous decisions.)
>
> *North Carolina Pub. Serv. Co. vs. Southern Power Co.*, 282 Fed. 837; at 840 (C. C. A. 4th Cir).

> "It is not within the power of the states to limit the jurisdiction of the national courts to entertain a suit." (Citing cases.)
>
> *Boatman's Bank vs. Fritzlen*, 221 Fed. 154, at p. 1160.

The argument on this point is another *non se-*

quitur. with which the briefs filed by the counsel appearing for the Receiver of the Building Company abound. The rule which, as they assert sullies the hands of complainant and produces their cry of "Unclean, unclean," is a rule unrecognized by the federal courts. In enforcing the clean hand maxim or the one requiring equity to be done before equity is sought a court will naturally only give effect to those equities which are known to and recognized by it. The maxim therefore fails of application in a case where it is sought as an aid to require the doing of something which may be considered equitable in a state court, but which, if not considered inequitable in the federal courts is at least considered of no effect at all. Finally, upon this point, counsel rely upon the case of *Cole vs. Cunningham*, 33 Law. Ed. 538. The same case is cited and relied upon by the same counsel in the brief filed by them on behalf of J. P. Duke as Supervisor, and others. (See that brief, p. 160.) In that case the Supreme Court of the United States affirmed the action of the Supreme Court of Massachusetts, which enjoined a citizen of that state who had participated in insolvency proceedings under the state laws from obtaining by attachment in New York a prior lien upon property of the debtor. The effect of such attachment if obtained would have been to have given a preference to the attaching creditor, contrary to the Massachusetts law, and would have operated to deprive the other creditors of the debtor of an equal share in the distribution

of the property so attached. To state that case is to prove it inapposite.

Much more in point is the decision of the Circuit Court of Appeals for the Third Circuit, in *Mitchell vs. Dougherty*, 90 Fed. 639. In that case there was involved a contract made in the state of Pennsylvania, and to be performed therein, containing a provision for arbitration by an architect. The lower court apparently relied upon certain Pennsylvania cases. Its decision, however, was reversed, the conclusion of the Circuit Court of Appeals being thus stated:

> "We have not felt called upon to discuss in detail the several Pennsylvania cases which have been urged upon our attention by the learned counsel for defendant in error. The question before us is not as to the enforcement of the contract in accordance with the law of the place where it was made, but is as to whether a court of the United States should because of the parties' agreement in advance to abstain from invoking its jurisdiction, refuse to enforce the contract at all. Upon this question the decisions of the Supreme Court of the United States are controlling, and they admit of but one conclusion." (Opinion at page 645.)

Effect of the Appointment of a Receiver.

Counsel for the Receiver in their statement of the case, whether inadvertently or through design,

omit all reference to the order of the lower court entered June 19, 1921, and appearing on page 55 of the record. (See Ante p. 8.) By refernce to that order in conjunction with the allegations made in the original answer of the Tacoma Millwork Supply Company (Tr. p. 166) it will be at once apparent that the appointment of the Receiver was not intended in any way to curtail the right to proceed with the lien foreclosure proceedings, but that such appointment was sought in aid thereof, and that leave to proceed with the lien foreclosure proceedings was expressly granted, the order reading:

> "Now, Therefore, it is ordered that all persons, and particularly the Far West Clay Company, having claims, demands, liens or encumbrances, against the property of the Scandinavian-American Building Company, are hereby authorized and empowered to make Forbes P. Haskell, the receiver thereof, a party to the foreclosure for said liens or encumbrances, in the above entitled action, and to sue the said receiver for the said purpose, and to serve on him the necessary papers, processes, or pleadings, to accomplish said purpose." (Tr. vol. 1, p. 55.)

Moreover it would seem worthy of comment that the same counsel who as attorneys for the Receiver of the Building Company are crying out against the action of the lower court in permitting the lien

claimants to proceed with their lien foreclosure proceedings, are as counsel for the Bank Supervisor and his Deputy asking this court, not only to permit them to foreclose certain mortgages in this proceeding, but that this court should decree such mortgages to be liens superior to the rights of the lien claimants, award them attorneys' fees in such proceeding, and thereby exclude the lien claimants from any actual relief whatsoever. They will undoubtedly say in reply that all they are seeking is to have their claims determined to be prior liens, and to be first paid out of the proceeds of the building, which may be realized by the Receiver of the Building Company, but such was not their position in the court below, and such is not their position in their opening brief on behalf of the Bank Supervisor. What is sauce for the goose should be sauce for the gander, and a court of equity should not listen with much patience to a claim asserted by counsel when they are on one side of the fence, and denied by the same counsel when they are on the other. However, and be that as it may, the authorities cited by counsel go no farther than to show that where a general receiver for a corporation has been appointed it is proper to ascertain the various claims against the corporation in the receivership proceeding, and there to determine their respective priorities and to provide for their payment in the order of the priority thus determined, out of any sums realized by the

Receiver from the corporate assets. None of them deny the right to permit the foreclosure proceedings to proceed, and all the authorities recognize that the appointment of a receiver does not divest or impair existing liens. The erroneousness of the lower court's procedure is not and cannot be demonstrated merely by showing that another course could properly have been followed. Such other course must be shown to be exclusive—which counsel for appellant do not claim for their suggested procedure.

In considering this question the court should bear in mind that the sole assets of the Building Company consisted of the lots and the steel skeleton erected thereon; that for all practical purposes there was nothing for the general creditors of the corporation; that the contest was solely between parties claiming liens of one kind or another; that in some form or other the validity of those liens would have to be determined; that proceedings in the regular way for the establishment of some, if not all, of those liens had been commenced prior to the appointment of any receiver, and that, inasmuch as those lien claims involved conflicting claims of priority, not only as between the liens on the one hand and the mortgages on the other, but also between the several lien claimants themselves, the continuous presence of all the parties would almost certainly be required not only at any series of hearings held by the receiver to determine the validity and priority of any particular lien claims,

but also at the inevitable review thereof by the court. Therefore, in the peculiar circumstances it was in aid of speedy justice and made for the avoidance of the multiplicity of hearings, to proceed in the regular way for the foreclosure of these liens. In such proceedings all parties could be and were present, and all questions were once and for all settled and determined.

The question is wholly one of practice upon a peculiar state of facts. It is not governed by any rule of court, nor by any statute, and consequently rests within the discretion of the court. It is not even remotely asserted that the discretion was abused. Under such circumstances citation of authority would seem to be a work of supererogation. The following certainly will suffice:

> "It is important to observe that the receiver's position is subject to all valid and existing liens upon the property at the time of his appointment and does not divest a lien previously acquired in good faith."
>
> *High, Receivers*, 4th Ed., sec. 138.
>
> "The court receives such property, impressed with all existing rights and equities of creditors and the relative rank of claims and standing of liens, unaffected by the receivership."
>
> 23 *R. C. L., Receivers*, sec. 118.

"So by the weight of authority the appointment of a receiver for the defendant in a pending action does not divest the lien which the plaintiff has secured, nor prevent him from proceeding to enforce or foreclose it."

23 *R. C. L., Receivers*, sec. 51, p. 49.

In *Chesapeake Coal Co. vs. Black, et al.*, 224 Fed. 924, the Circuit Court of Appeals for the Eighth Circuit were considering the right of a claimant who had secured a lien, prior to the appointment by the federal court of a receiver, to proceed to the enforcement thereof. Judge Sanborn, rendering the opinion, said:

"Its liens upon the real estate and upon the money or property held for the furnace company by the railway companies were secured before the receiver was appointed. He and the court that appointed him took the property subject to those liens, and the coal company had both the legal and equitable right until it obtained complete payment of the debt which the furnace company owed it simultaneously to enforce each of those liens against the property, subject to it in any and every court that had or acquired jurisdiction of that property." (Opinion at p. 926.)

See also:

Schmidtman vs. Atlantic Phosphate Corp., 230 Fed. 769 (C. C. A. 2nd Cir.).

"Liens upon the insolvent's property can be enforced against the receiver except to the extent that he represents the holder of a prior lien."

Foster Federal Practice (6th Ed.), vol. 2, p. 1614.

In this connection it is significant to note that the Receiver of the Building Company has taken no steps whatsoever to have the claims against the Building Company submitted to him for allowance or rejection. No notice requiring creditors to file claims has ever been given. On the contrary, the Receiver was content to sit from the date of his appointment in March of 1921, until the day when this case was called for trial, and allow the lien claimants to proceed with their foreclosure proceedings without question or objection of any kind, and he has never attempted to realize upon the assets in his hands for the benefit of the lien claimants and the other general creditors of the Building Company.

The objection to the procedure adopted by the trial court made by the Receiver on the day the trial commenced came too late. By failure to interpose it either in his pleadings or by some appro-

priate motion or application made to the court it must be held to have been waived. If the point is not resolved against the Receiver on that ground then it must be under the familiar rule that a Receivership will not be permitted to operate so as to hinder or delay realization by the creditors upon their claims. As demonstrated above, the Receiver has as yet taken no steps by which the creditors could establish their claims, except in the manner they have followed. The only claim of prejudice made by appellants to this course is through the allowance of attorneys' fees. Yet such fees are under the Washington statute an incident to the claim and would have had to have been fixed and allowed by the Receiver had he in due season taken steps to have had these claims proven before him.

The other questions raised by the appeal of the Building Company's Receiver do not affect the McClintic-Marshall Company—there was no lien waiver in its contract. On the contrary the position taken by the Receiver on the lien waiver question has been at all times concurred in by the complainant, and in certain other briefs which will be filed in this cause on behalf of the McClintic-Marshall Company that question will be considered at some length. We therefore will enter into no discussion of it here. We respectfully submit that the action of the lower court with respect to the effect of the arbitration clause, and as to the effect of the appointment of the Receiver was in all respects proper and correct,

and that the decree appealed from should be affirmed.

Respectfully submitted,

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